

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**CWP No. 8122 of 2025****Decided on: 19.05.2025**

M/s Oasys Cybernetics Pvt. Ltd.Petitioner

Versus

State of H.P. & Anr.Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Sushil Kukreja, Judge.

Whether approved for reporting? **Yes.**

For the petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate.

For the respondents : Mr. Anup Rattan, Advocate General with Mr. Ramakant Sharma, Mr. Navlesh Verma, Ms. Sharmila Patial, Mr. Sushant Keprate, Additional Advocates General and Mr. Raj Negi, Deputy Advocate General.

Tarlok Singh Chauhan, Judge (oral)

The instant petition has been filed for grant of the following substantive reliefs:-

“(1) That a writ in the nature of certiorari may very kindly be issued thereby quashing and setting aside Notification dated 9.9.2024 (Annexure P-23).

(II) That the arbitration proceedings pending before Director, Department of Digital Technologies and Governance, Sole Arbitrator in the matter of Director, Food, Civil Supplies and Consumer Affairs v. M/s Oasys Cybernetics Pvt. Ltd. May kindly be ordered to be quashed and set aside.

(III) That the respondents may kindly be directed to make payment to the petitioner in terms of SLA, Annexure P-2, dated

27.05.2017, from due date at the rate of Rs. 1023/- per month, per ePOS device alongwith interest at the rate of 9% per annum for the delayed payment, from due date, till the date of actual payment.”

2. The petitioner has two fold grievance with regard to the appointment of arbitrator. The first plea is unilateral appointment of the arbitrator at the instance of the respondents without consulting the petitioner and secondly to the appointment of Director, Department of Digital Technologies and Governance, H.P., being appointed contrary to Section 12 (5) read with Schedule 7 of the Arbitration and Conciliation Act, 1996 (for short “Act”).

3. Clause 27 of the agreement entered into between the parties reads as under:-

“27. That all disputes arising out of the tender and the contract or in connection thereof, the matter shall be referred to the Arbitrator, as per the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time. All legal proceedings, if necessary, related to any of the parties shall be subject to the civil jurisdiction of competent court of law at Shimla (HP) only.

4. A bare perusal of the aforesaid Clause would go to indicate that there was no authority with the respondents to have unilaterally appointed the arbitrator. The respondents have clearly overlooked the provisions of the Act while appointing the Director, Department of Digital Technologies and Governance, H.P., as the sole arbitrator.

5. Section 12(5) of the Act reads as under:-

“(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

6. Schedule Seven of the Act reads as under:-

“Arbitrator’s relationship with the parties or counsel

- 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
- 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
- 3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
- 4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.*
- 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
- 6. The arbitrator’s law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
- 7. The arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*
- 8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
- 9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*
- 10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.*
- 11. The arbitrator is a legal representative of an entity that is a party in the arbitration.*
- 12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute."

7. A plain reading of the above Section and Schedule would indicate that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the disputes, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator or to act as an arbitrator.

8. The Seventh Schedule of the Act would clearly indicate that as to what amounts to relationship between the parties or the counsel. The different classes of persons enumerated in item No. 1 to 14 are to be construed or considered as amounting to relationship with the parties or

counsel or with the arbitrator. Clause 1 of the Seventh Schedule would indicate that if the arbitrator is an employee, consultant, advisor or has any other present or past business relationship with a party, it would act as an embargo. In other words, if there is any privity of contract between the arbitrator and/or either of the parties, it would act as an embargo for such arbitrator to arbitrate the dispute. Such privity of contract can be either in present or past. To put it differently, the embargo placed under sub-section (5) of Section 12 would continue to operate where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the parties and this relationship would act as an obstacle or hindrance for such person to act as an arbitrator or continue as an arbitrator.

9. The neutrality of the arbitrator is the hallmark of the arbitration proceedings, or in other words, the hallmark of an arbitration proceedings is that the arbitrator is required to raise above the partisan interest as held by the Hon'ble Supreme Court in the case of ***Voestalpine Schine GMBH Vs. Delhi Metro Rail Corporation Ltd.***, reported in (2017) 4 SCC 665. The adjudication by an arbitrator should be such that neither of the parties would get even an iota of doubt with

regard to impartiality of the arbitrator. To rule out any such remote doubt arising in the minds of the parties, sub-section (5) of Section 12 has been inserted by the Parliament foreseeing such contingencies and it has been prescribed under the Seventh Schedule that such of those relationship, which can be construed as raising a remote doubt with regard to the impartiality of the arbitrator should act as embargo for the arbitrator to continue if already appointed or act as a bar for being appointed as arbitrator. If such arbitrator were to fall within the four corners of the definition specified in item No. 1 to 14 of the Seventh Schedule necessarily the embargo placed under sub-section (5) of Section 12 would surface and in such circumstances, the arbitrator will have to necessarily withdraw so as to give rise for appointment of another arbitrator for adjudicating the disputes.

10. At this stage, it shall be apt to refer to the judgment of Hon'ble Supreme Court in ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. Vs. Ajay Sales and Suppliers***, AIR 2021 SC 4869, more particularly, the observations as contained in paragraphs 8 & 9, which read as under:-

"8. Now the next question which is required to consider is whether the Chairman who is an elected member of the petitioner Sahkari Sangh can be said to be 'ineligible' under

Subsection (5) of Section 12 read with Seventh Schedule to the Act or not. It is the case on behalf of the petitioner that in the Seventh Schedule to the Act Seventh Schedule to the Act 'Chairman' is not mentioned and only Manager, Director or part of the Management can be said to be ineligible. The aforesaid has no substance at all. Disqualification/ineligible under Subsection (5) of Section 12 read with Seventh Schedule to the Act is to be read as a whole and considering the object and purpose for which Subsection (5) of Section 12 read with Seventh Schedule to the Act came to be inserted. Subsection (5) of Section 12 read with Seventh Schedule has been inserted bearing in mind the 'impartiality and independence' of the arbitrators. It has been inserted with the purpose of 'neutrality of arbitrators'. Independence and impartiality of the arbitrators are the hallmarks of any arbitration proceedings as observed in the case of [Voestalpine Schienen](#) (Supra). Rule against bias is one of the fundamental principles of natural justice which apply to all judicial proceedings and quasijudicial proceedings and it is for this reason that despite the contractually agreed upon, the persons mentioned in Subsection (5) of Section 12 read with Seventh Schedule to the Act would render himself ineligible to conduct the arbitration. In paragraphs 20 to 22 in the case of [Voestalpine Schienen](#) (Supra) it is observed and held as under:

"20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted

this aspect in *Hashwani v. Jivraj* in the following words:
(WLR p. 1889, para 45)

“45the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

21. Similarly, *Cour de Cassation, France*, in a judgment delivered in 1972 in *Consorts Ury*, underlined that:

“an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.”

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.”

9. Applying the law laid down by this Court in the aforesaid decisions and considering the object and purpose of insertion of Subsection (5) of [Section 12](#) read with [Seventh Schedule to the Act](#), the Chairman of the petitioner Sangh can certainly be held to be ‘ineligible’ to continue as an arbitrator. Though in the Seventh Schedule the word ‘Chairman’ is specifically not mentioned but at the same time it would fall in the category of Clause 1; Clause 2; Clause 5; Clause 12 which read as under:

“1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.”

9.1 In that view of the matter, the Chairman who is elected member/Director of the Sangh, can certainly be said to be ‘ineligible’ to become an arbitrator as per Subsection (5) of [Section 12](#) read with [Seventh Schedule to the Act](#).”

11. Keeping in view the law laid down by the Hon’ble Supreme Court, we are of the considered view that the statutory bar contained in sub-section (5) of Section 12 would squarely be applicable as the Director, Department of Digital Technologies and Governance, cannot be held to be independent and impartial arbitrator because he could be a consultant or a advisor of the respondents.

12. Learned Additional Advocate General states that much progress has already been made in the proceedings that have been conducted before the arbitrator, which may become futile in case another arbitrator is appointed.

13. However, we are of the considered view that pleadings and other material, i.e. reply/evidence that has come on record should remain as it is even while appointing second arbitrator, save and except, in case the petitioner or the

respondents are trying to place on record any additional material.

14. Accordingly, at the joint request of parties Mr. Deepak Kaushal, Senior Advocate is appointed as Arbitrator. Director, Department of Digital Technologies and Governance, H.P. is directed to hand over the records of the proceedings through the respondents to the learned Arbitrator now appointed by this Court. The fee of the Arbitrator shall be fixed as per the Schedule of the Act. The parties are directed to appear before the Arbitrator on 21.06.2025 at 11:00 a.m. at Room No. A-1, 2nd Floor, MC Parking, Near High Court, Shimla-1.

15. In view of the above, the petition, so also pending application(s), if any, stands disposed of.

(Tarlok Singh Chauhan)
Judge

(Sushil Kukreja)
Judge

19th May, 2025
(raman)